

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument the parties agreed that the 24 percent functional permanent impairment as determined by the ALJ was not in dispute. The parties also agreed that claimant's entitlement to future medical benefits, upon proper application, was not disputed.

ISSUES

The ALJ found claimant to be “completely and permanently incapable of engaging in any type of substantial and gainful employment”¹ and awarded permanent total disability compensation.

The respondent requests review of the nature and extent of claimant’s disability arguing claimant is capable of substantial and gainful employment within the restrictions assigned by Dr. Mills. Respondent goes on to assert that claimant has failed to make any attempt to find appropriate post-award employment. Thus, under the principles set forth in *Foulk*² and *Copeland*,³ claimant is entitled to a permanent partial general disability award that includes a wage loss based upon an imputed wage, rather than her actual wage loss of 100 percent.

Claimant argues that she is permanently and totally disabled, and therefore requests that the ALJ's Award be affirmed.

The only issue to be decided by this appeal is whether claimant is permanently and totally disabled under K.S.A. 44-510c(a)(2), or if she is entitled to a permanent partial general disability under K.S.A. 44-510e(a).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds the ALJ's Award should be affirmed in all respects.

The facts surrounding this claim along with the evidence presented by the parties have been meticulously set out in the Award and the Board adopts them as its own. Accordingly, only those facts necessary to explain the Board’s decision will be referenced.

Distilled to its essence, claimant maintains she is entitled to permanent total disability benefits under K.S.A. 44-510c(a)(2) as she is incapable of working in any form of meaningful employment. Conversely, respondent maintains claimant can work and although entitled to a work disability, under K.S.A. 44-510e(a), is entitled to an Award that takes into consideration claimant’s failure to attempt to find employment since her injury.

¹ ALJ Award (Sept. 19, 2005) at 7.

² *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

³ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

K.S.A. 44-510c(a)(2) defines permanent total disability as follows: “Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment.” The terms “substantial and gainful employment” are not defined in the Kansas Workers Compensation Act. But case law makes it clear that a claimant’s age, training, previous work history and physical limitations are relevant to the issue.⁴

In this instance, the ALJ concluded that claimant met the *Wardlow* criteria. He reasoned that:

...[c]laimant’s permanent work restrictions would make it exceedingly difficult to find any work within her abilities. Her previous employments have all required physical labor, which she is no longer capable of performing. She has no training, experience or transferable job skills that would enable her to readily move into a different field of endeavor. [Dan] Zumalt’s analysis that [c]laimant could return to work is seriously flawed, demonstrating both his lack of understanding of [c]laimant’s restrictions and the availability of jobs within her limitations. Further, his projection of potential wages and benefits is both unrealistic and unattainable.⁵

The Board has considered respondent’s arguments and concludes the ALJ’s findings are sound and should be affirmed. Like the ALJ, the Board finds Mr. Zumalt’s opinions on claimant’s employability are exceedingly optimistic. Mr. Zumalt testified claimant could work as a “Clerk II”, which includes positions as a gas station attendant, theater ticket cashier/ticket taker or at a grocery store as a cashier. He further maintains these positions would meet Dr. Mills restrictions as full-time sedentary employment. Mr. Zumalt further maintains this sort of position would, based upon the Kansas Wage Survey, yield an average wage of \$7.18 per hour along with \$1.46 an hour in fringe benefits. However, Mr. Zumalt admits that the Kansas Wage Survey does not necessarily reflect accurate wages for “Clerk II” positions. Nor did he have any idea if such positions were available to claimant either in Saline County, where the accident occurred, or in her present location, Junction City, Kansas.

Mr. Zumalt’s employment opinions did not take into consideration claimant’s need to elevate her right foot or wear support socks to account for the ongoing swelling and pain she experiences throughout the day. His opinions likewise failed to take into account Dr. Mills’ suggestion that claimant limit her standing and walking to 10-15 minutes at a time. Finally, his suggestion that claimant could earn \$1.46 an hour in fringe benefits for the suggested cashier jobs appears overly optimistic. And in fact, the \$1.46 figure far exceeds the .89 cents per hour she had been receiving at her pre-injury job with respondent.

⁴ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 114, 872 P.2d 299 (1993).

⁵ ALJ Award (Sept. 19, 2005) at 7.

The Board concludes the opinions of Dr. Stein and Richard Santner, the vocational specialist, both whom concluded claimant was essentially and realistically unemployable, are the most persuasive. Accordingly, the Board affirms the ALJ's conclusion that claimant is permanently and totally disabled under K.S.A. 44-510c(a)(2). As such, the balance of respondent's arguments with respect to work disability are moot.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated September 19, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant
P. Kelly Donley, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director